

1 Honorable Thomas S. Zilly
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9 **U.S. DISTRICT COURT**

10 **FOR THE WESTERN DISTRICT OF WASHINGTON**

11 STRIKE 3 HOLDINGS, LLC, a
12 Delaware corporation,

13 Plaintiff,

14 vs.

15 JOHN DOE, subscriber assigned IP
16 address 73.225.38.130,

17 Defendant.

18 JOHN DOE, subscriber assigned IP
19 address 73.225.38.130,

20 Counter-claimant,

21 vs.

22 STRIKE 3 HOLDINGS, LLC, a
23 Delaware corporation,

24 Counter-defendant

25 Case No. 2:17-cv-01731-TSZ

26 **DEFENDANT'S EVIDENTIARY
27 OBJECTIONS TO DECLARATION
OF EMILIE KENNEDY**

Defendant and Counter-Claimant John Doe (“Doe”) submits the following evidentiary objections to the Declaration of Emilie Kennedy in Support of Plaintiff’s Motion to Dismiss Defendant John Doe’s First Amended Counterclaims (Docket 41).

GENERAL OBJECTIONS

Plaintiff has not filed a Motion for Summary Judgement, as such, evidence that has not been judicially noticed should not be referred to in a motion to dismiss.

SPECIFIC OBJECTIONS

STATEMENT AT ISSUE	OBJECTION	COURT’S RULING
¶7- “According to the Google Transparency Report...”	Hearsay. Fed. R. Evid. 801, 802. The contents of the Google Transparency Report are out-of-court statements improperly being offered for the truth of what they assert.	
¶8 – “Many of these URL requests were directed to torrent websites – the same websites the defendants in our lawsuits access to infringe our content”	Hearsay. Fed. R. Evid. 801, 802. The contents of the Google Transparency Report are out-of-court statements improperly being offered for the truth of what they assert. Lack of Personal Knowledge and Foundation. Fed R. Evid. 602, 901. Ms. Kennedy has laid no foundation, nor demonstrated any personal knowledge of sites accessed by Doe or any other alleged infringers.	

	<p>Relevance. Fed. R. Evid. 401, 402.</p> <p>Alleged activity by other defendants in other cases is irrelevant to the activities of Doe in this case.</p>	
<p>¶8 - ... “For Example, on September 27, 2017, the same day Defendant’s IP address was infringing our content, we issued 9,896 DMCA takedown notices, primarily to torrent websites.”</p>	<p>Lack of Personal Knowledge and Foundation. Fed R. Evid. 602, 901.</p> <p>Ms. Kennedy has laid no foundation, nor demonstrated any personal knowledge of any actual infringement.</p> <p>Relevance. Fed. R. Evid. 401, 402.</p> <p>The connection between the day DMCA notices were sent out and any alleged infringement is irrelevant. No evidence that the DMCA notices were related to any alleged infringing activity related to this case.</p>	
<p>¶9 – “Unfortunately, each month, the infringement we experience on BitTorrent networks seem to grow as our brand becomes more popular”</p>	<p>Lack of Personal Knowledge and Foundation. Fed R. Evid. 602, 901.</p> <p>Ms. Kennedy has laid no foundation, nor demonstrated any personal knowledge of the increasing popularity of the brand or any purported link to infringement activity.</p>	

	<p>Relevance. Fed. R. Evid. 401, 402.</p> <p>Any connection between the infringement and brand popularity is irrelevant.</p> <p>Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons Fed. R. Evid. 403.</p> <p>Ms. Kenney's statement that a variable "seems to" be related to a separate variable is unfounded, and confusing.</p> <p>Expert Testimony Fed. R. Evid. 403.</p> <p>Improper expert testimony - Insomuch as any link could be inferred from purported infringement activity and brand awareness, this testimony would need to be provided by an expert in brand recognition, and its statistical relevance to any alleged infringement. Ms. Kenney is wholly unqualified to provide such evidence.</p>	
¶10 – "...This was largely because nominal penalties or incentives existed under this system that encouraged individuals to cease their infringing activity"	<p>Lack of Personal Knowledge and Foundation. Fed R. Evid. 602, 901.</p> <p>Relevance. Fed. R. Evid. 401, 402.</p> <p>Hearsay. Fed. R. Evid. 801, 802.</p>	

	<p>Ms. Kennedy has no personal knowledge of the business practices of media content providers. Furthermore, the business practices of these other entities are irrelevant to this case.</p>	
<p>¶11 – “I do not know of any ISPs that actually terminate repeat infringers after receiving notices of infringement. I not believe that they did for the major record labels and movie studios ”</p>	<p>Lack of Personal Knowledge and Foundation. Fed R. Evid. 602, 901.</p> <p>Relevance. Fed. R. Evid. 401, 402.</p> <p>Hearsay. Fed. R. Evid. 801, 802.</p> <p>Ms. Kennedy has no personal knowledge of the business practices of internet service providers. Her beliefs, absent any empirical evidence of ISPs being unable/unwilling, to enforce their copyright infringement policies in response to specific requests in this particular matter, are irrelevant in this case. Paradoxically, while Strike 3 claims not to send DMCA notices to ISPs because these notices do not “curb infringement” (Docket 41, ¶10) Strike 3 claims to send out thousands of DMCA notices to BitTorrent websites monthly despite apparent first-hand knowledge that “only a lawsuit” will stop infringement. This inconsistency is confusing</p>	

	<p>and any related evidence should be excluded.</p> <p>Evidence of an ISP's (here Cox Communications'), practice of terminating accounts linked to infringers can be readily be found.</p> <p>(See Exhibit 1, ¶7).</p>	
<p>13 – “Defendant’s assertion that we have only sued defendants in wealthy cities....”</p>	<p>Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons Fed. R. Evid. 403.</p> <p>Misstates testimony – Doe alleges selective filing across states (Docket 38, ¶6), rather than individualized cities in a particular state.</p>	

Respectfully submitted on June 25, 2018 by: /s/ J. Curtis Edmondson
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CERTIFICATE OF SERVICE

I, J. Curtis Edmondson, hereby certify that on June 25, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 25th day of June, 2018.

By: /s/ J. Curtis Edmondson
J. Curtis Edmondson